INSTITUTIONAL SUPPORT
TO
THE MALAWI MINISTRY OF TRANSPORT

RAILWAYS

LEGAL FRAMEWORK

Submitted to:
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Lilongwe, Malawi

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Malawi Ministry of Transport Project
Contract: PCE-1-00-97-0042-00
Task Order: 805

SUMMARY OF FINDINGS AND RECOMMENDATIONS: RAILWAYS

The Railway Act is an old Act which was prepared to address a policy and operational context which has subsequently undergone fundamental change with the adoption of the privatization policy. Although the Act does not pose a barrier to the railway concession proceeding, it does require supplementation to provide a post-concession management and safety regulation framework. Such supplementation cannot occur by way of regulations, as the Act does not currently provide authority which is sufficiently wide to address issues relevant to the new concessioning environment. Minor conflicts occur between the Act and the concession agreement which should be addressed through appropriate amendments to the agreement as well as the inclusion of an addendum to eliminate potential conflicts with the Act. Amendments to the Act to bring it into line with the new policy and the concession should be undertaken at the earliest opportunity.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
1. Introduce comprehensive provisions enabling Ministry of Transport to manage concessions and spell out relationship with the Privatization Commission.	The Public Enterprises (Privatization) Act (PEPA) is aimed at once-off privatization and does not provide a framework for post-concessioning management. It is uncertain whether or not the Commission will still be in existence once the concession comes up for renewal. The need to renegotiate the concession may also arise earlier and there will be a need for statutory powers to re-concession, preferably subject to the procedures spelt out in the PEPA and its accompanying regulations.	Amendment of the Railway Act through the inclusion of the provisions listed in annex 1 as a new part after the present part II - Opening of the Railway.	This is not an immediate priority, but should, if possible be undertaken in line with the other amendments to the RA proposed below. However, priority amendments should not be delayed for the sake of including these provisions.
2. Deletion of anti-competitive, anti-commercial provisions and provisions conflicting with the concession agreement.	These provisions spell out commercial relationships between railways and consumers which are addressed more effectively in the Competition and Fair Trading Act, 1998 (CFTA). In addition, some provisions inhibit the commercial freedom of the railway, eg the requirement to charge reasonable rates or are inappropriate to a commercial environment, eg the requirement that the railway disprove undue preference. Certain provisions also conflict with the terms of the concession agreement, eg the requirement that freight rates be fixed in the General Rules.	Delete sections 15 (2), 23 - 29 and 48 .	These amendments are the **principal** legislative priority. Although they do not pose an immediate barrier to the conclusion of the concession, the provisions address issues which may become relevant immediately after the concession is concluded. They should preferably be dealt with as a matter of priority within the government's legislative programme.

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
3. Amendment of the concession agreement to exclude the requirement for Ministerial approvals for services, confirm that the concessionaire is free to set rates and does not need to develop General Rules and introduce the requirement of compliance with safety standards.	Sections 15, 16 and 17 of the RA could be interpreted as requiring Ministerial approval for the use of locomotives and rolling stock and Ministerial sanction before passenger services may be provided. This contradicts the presumed intention of the concession agreement which is that the agreement functions as authorisation to commence services. Although the Act may also be interpreted as not requiring the concessionaire to have statutory approvals, the inclusion of an appropriate addendum to the concession agreement in which the Minister (of Transport) confirms the granting of such approvals, is the risk free option. By the same token, Sec 48 may be interpreted as requiring the concessionaire to formulate General Rules and requiring ministerial approval of rates. An addendum to the concession agreement will serve to clarify that such an interpretation will not apply.	Inclusion of an addendum to the concession agreement stating that upon signature of the agreement the Minister (of Transport) certifies the granting of all approvals required in terms of Sections 15 and 17 and confirms that the concessionaire does not need to formulate General Rules (See annex 2).	Action must be taken prior to the finalization of the concession agreement.
4. Amendment of the concession agreement to accommodate the proposed safety regulatory approach.	In terms of the proposed safety regulatory approach, the concessionaire will be required to prepare a safety plan and will be required to certify periodically that the railway complies with all aspects of the plan. This approach seeks to minimize intervention by the Minister and place a greater part of the responsibility for developing and maintaining safety standards on the railways. At the same time, the Ministry is provided with adequate powers to undertake regulatory action.	Insertion of a sub-clause in the agreement requiring the concessionaire to develop a safety plan upon direction of the Minister.	Action must be taken prior to the finalization of the concession agreement

RECOMMENDATION	MOTIVATION	IMPLEMENTATION REQUIREMENTS	PRIORITY
5. Amendment of Railway Act to provide statutory basis for proposed regulatory approach.	Strengthen safety regulation of concession through provisions empowering Minister to require railway to develop a safety plan for approval, to conduct safety investigations and to issue compliance directives. Provide statutory basis in RA for amicable dispute resolution and arbitration procedures provided for in the DCA in cases of contractual disputes.	Amendment of the Railway Act through the insertion of annexes 3 and 4 as new parts.	Same priority as 1 above. Similar considerations apply with regard to the need not to delay the main priorities listed in 2 above.
6. Repeal the Malawi Railways Holdings Company Act (MRHC)	The Act is redundant following the winding up of Malawi Railways Ltd.	Act repealing the MRHC Act.	Low priority, but should be included in the legislative package.

1. BACKGROUND

1.1 LEGAL FRAMEWORK

The legal framework for the Malawi railway sub-sector comprises:

- the National Transport Policy, 1998 and the Privatization Policy, 1996;
- railway-specific legislation, namely:
  - the Railway Act, 1907 (RA); and
  - the Malawi Railways Holdings Company Act, 1986;
- generally-applicable legislation, namely:
  - the Public Enterprises (Privatization Act), 1996 (PEPA);
  - the Environmental Management Act, 1996 (EMA); and
  - the Competition and Fair Trading Act, 1998 (CFTA);
- a draft Concession Agreement for the Management and Operation of Malawi Railways (DCA);
- the bilateral agreement between Malawi and Mozambique on joint railway operations; and
- the SADC Protocol on Transport, Communications and Meteorology (SADC Protocol).

1.2 RAILWAY ACT, 1907

The RA is the principal regulatory legislation applicable to the railways. It comprises 89 sections divided into 8 parts and a number of (unnamed) introductory provisions. The parts address:

- Construction and Works;
- Opening of the Railway;
- Traffic;
- Rates (municipal taxes);
- Legal Proceedings;
- Responsibility of the Railway Administration as Carriers;
- Accidents; and
- Management.

1.3 MALAWI RAILWAY HOLDINGS COMPANY ACT, 1986

This Act provides for the incorporation of the Malawi Railway Holdings Company (MRHC) as a company with limited liability, and provides for a Board of Directors to manage the company. The Act prescribes the composition of the Board and determines how the Board must calculate profits for dividend payments.

Provision is made for the duties of the Board and the Minister in relation to the financial records and accounts of the company.

The MRHC holds the shares in Malawi Railways Ltd, a company incorporated under the United Kingdom Companies Act. Malawi Railways Ltd is currently being wound down by an administrator. As a consequence, the MRHC is essentially defunct and there is no justification for its continued

existence. In practice, the MRHC Act may be repealed. This will not affect the continued existence of the current railway operator, Malawi Railways (1994) Ltd which is incorporated under the Malawi Companies Act and whose shares are held by the Treasury.

1.4 PUBLIC ENTERPRISES (PRIVATIZATION) ACT, 1996

This Act establishes the Privatisation Commission as the sole authority to implement the privatisation of direct or indirect government ownership of any enterprise. The Commission reports directly to the Minister responsible for Public Enterprises. Privatisation occurs in terms of a divestiture sequence plan which identifies those enterprises with a commercial orientation which will be the subject of privatisation. Enterprises not considered to have a commercial orientation will revert to the control of the appropriate ministry. As part of this process, the Act also mandates the commercialisation of any government department.

1.5 ENVIRONMENTAL MANAGEMENT ACT, 1996

This Act makes provision for the protection and management of the environment and the conservation and utilisation of natural resources. Promotion of sustainable utilisation of natural resources is one of the general guiding principles. It confers a right to a decent environment on inhabitants, setting out the criteria and procedures for complainants who wish to commence action. The Minister responsible for environmental affairs acts in consultation with lead agencies to realise the objectives of the Act. Institutional provisions include the appointment of the Director of Environmental Affairs, establishment of the National Council for the Environment, and the Technical Committee on the Environment and the Act sets out the duties and responsibilities of these organs.

One of the primary responsibilities of the Minister is to draw up a National Environmental Action Plan which must be submitted to the National Assembly for approval. The Act prescribes the processes for designing environmental impact assessment reports and allocates responsibility for periodic environmental audits. Environmental management provisions are included to make it possible to establish control in respect of access to genetic resources and management of waste. Furthermore, the Act contains provisions aimed at controlling pollution and provides for the designation of environmental inspectors.

The Act sets up an Environmental Fund which is controlled by the Minister. Offences and penalties are regulated and the Act also contains a provision conferring immunity against legal proceedings on officials in respect of actions undertaken in good faith in terms of the Act.

1.6 COMPETITION AND FAIR TRADING ACT, 1998

The Act establishes the Competition and Fair Trading Commission with the broad functions of regulating, monitoring, controlling and preventing any Act which adversely affects competition or fair trading. The Act prohibits anti-competitive trade practices and permits the commissions to control mergers and takeovers and regulates the relationship between suppliers of goods and services and consumers. For the purpose of promoting a fair competition regime, the commission may conduct investigations and convene hearings and generally take such action as it deems necessary to achieve the objects of the Act.

1.7 Viewed collectively, the above Acts, policy statements and DCA provide the broad legal context for the railway sub-sector. In assessing the current legal framework, a number of factors must be borne in mind:

1.7.1 The RA is an old Act (1907) which has clearly been prepared to apply in a different policy and operational environment. Even its most recent amendment, (1971) dates back nearly 30 years. It appears, moreover, that a number of provisions are no longer or have never been applied, eg the duty of the railways to prepare General Rules for approval by the Minister. The non-application of sections of the RA has some implications for the manner

in which the concessioning process has been dealt with, as will become apparent below.

1.7.2 The RA has not provided a legal framework for the concessioning of the Malawi Railways. Instead, the concessioning process has been undertaken in terms of the authority provided in the PEPA.

1.7.3 Given that the concession has proceeded in terms of the PEPA, it is not surprising that the DCA is largely silent on the provisions of the RA. In practice, there are only limited references made to the Act in the agreement, eg that the Minister of Transport will be responsible for regulating railway activities "pursuant to the Railway Act" (Clause 2).

1.8 Against the above background, a primary focus of this report has been the **appropriateness** of the current legal framework for a future concessioned railway. This has principally necessitated an analysis and comparison of the RA and DCA (although a complete analysis of the DCA as a concessioning instrument falls outside the scope of this report).

1.9 The principal conclusion derived from this analysis is:

1.9.1 In the **short term**, the existing provisions of the RA pose no **barrier** to the concessioning of Malawi railways.

1.9.2 Once the concession is up and running, a number of problems could potentially arise due to the existence of **minor conflicts** between the RA and DCA. In so far as both the government and the concessionaire have structured their relationship on the DCA, any negative impact on the implementation of the concession is unlikely. In some cases, these conflicts can even be resolved through minor amendments to the DCA prior to its finalization. However, this option does not exist in all cases and can only be resolved through an amendment to the RA at the earliest opportunity.

1.9.2 **In the longer term, the RA does not provide an adequate framework for the management and safety regulation of concessioned railways.** The RA requires supplementation to provide such a framework. The discussion under 2.3, 2.4, 4.3 and 4.4 provides further detail in this regard.

1.10 The remainder of this report addresses:

- a **policy narrative** of the current provisions of the National Transport Policy (NTP) and the SADC Protocol;
- a **status quo narrative** of the existing legal framework with reference to:
  - concessioning;
  - competition;
  - safety;
  - user protection; and
  - the regulatory system.
- a **status quo analysis** of the existing legal framework in order to assess the degree to which there is convergence or divergence between the NTP, the Protocol and current Malawi legal framework (laws, agreements, etc); and
- **recommendations** for amendment of the legal framework to:
  - ensure convergence between the NTP and the legal framework; and
  - in the particular case of the railway concession, ensure that

(a) conflicts between the RA and the DCA are eliminated; and

(b) the RA and the DCA collectively, provide an appropriate framework for the concession to proceed on the basis of minimum risk.

2. CONCESSIONING

2.1 POLICY

The NTP adopts the objective to:

"Create a climate in Malawi that promotes and sustains the participation of the private sector in the financing, the construction, the maintenance and the management of rail lines".

To this end, the strategy is proposed to:

"Enact a law that contains strong protection for the sanctity of contracts and imbues promoters, concessionaires, funders and builders in the private sector with confidence that a concession agreed during the term of office of the current government will not be revoked by future governments".

2.2 STATUS QUO NARRATIVE

The RA contains no authority for the concessioning of the railway. Accordingly, the current concessioning process has had to be conducted in terms of the PEPA. PEPA essentially focusses on the privatization of public enterprises through the trading of shares or the sale of assets. It does not expressly provide for concessioning, although Sec 25(g) allows the Privatization Commission the discretion to propose suitable privatization alternatives. By implication, such alternatives may include concessioning.

Various roles are foreseen in the PEPA for the Minister responsible for the privatization of public enterprises, the Minister of Finance and the Privatization Commission.

The Privatization Commission advises the Minister and is primarily responsible for preparing the divestiture plan and giving effect to the procurement process. In terms of the DCA, the Privatization Commission is also responsible for the collection of concession fees (Clause 51).

The Minister responsible for the privatization of public enterprises is empowered to approve the sale of shares in, or assets of, any state-owned enterprise (which includes Malawi Railways through the definition of "public enterprise" (Sec 2)) or alternative form of privatization, eg the concession.

The Minister of Finance, in turn, is empowered:

- to sign any final agreement to give effect to the sale of shares or assets or other form of privatization; and

- as part of such agreement, to retain, or acquire a "golden share" in a privatized enterprise which confers special rights upon Government and enables it to intervene in the operations of a privatized enterprise in the public interest (Sec 21). Such intervention only takes place where the enterprise has, through its own actions, endangered the public interest.

The concessioning process is far advanced and a Draft Concession Agreement for the Management and Operation of Malawi Railway (DCA) has been prepared and signature thereof is imminent. A single concessionaire to operate both the Malawi railway and Nacala rail system has been selected. Although a combined bidding process for both countries was envisaged, in practice, separate processes were

engaged in, which will result in the conclusion of two separate concession agreements by the Governments of Malawi and Mozambique. Initially, the concessionaire will have exclusive use of the railway infrastructure but after a period of five years, the Minister may instruct the concessionaire to allow any other railway service provider access to the infrastructure for a fee to be agreed upon between the service providers.

2.3 STATUS QUO ANALYSIS

A distinction must be drawn with regard to the utility of the RA for the concessioning process between the **short** and **long term**.

In the **short term**, the RA presents no barrier to the concessioning process which can be adequately managed by the Privatization Commission in terms of the PEPA.

In the **long term**, the RA will not adequately meet the government's management needs in terms of concessioned railways. The PEPA focuses on the once-off process of privatization (or concessioning) and therefore, does not aim to provide a legal framework for a post-concessioning environment and cannot supplement the RA in this regard. In the longer term, it is possible that the Privatization Commission will be phased out and that functional responsibility for concessioning will be undertaken by line function ministries. This is apparent from the fact that the DCA vests responsibility for oversight of the concession in the Minister responsible for transport (and by extension the ministry officials). It can, therefore, be assumed that responsibility for future concessions, in the absence of the Privatization Commission, will have to be assumed by the ministry.

At a minimum the RA should provide an **enabling framework** to empower government to manage future concessions by providing, for:

- an authority to conclude concessions, subject to the approval of the Privatization Commission; and
- bidding arrangements (in this regard, the regulations made under PEPA provide appropriate provisions which would be useful to apply even if the Privatization Commission is disbanded).

A complete management framework will also include other aspects relevant to the post concession environment, eg reporting by the concessionaire and collection of information.

2.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- The current concession proceed in the manner envisaged by the PEPA; but
- that the RA be amended to provide an adequate long term **enabling framework** for the management of concessions.

The RA will provide a general authority to concession the railway without designating the Minister or Ministry who will be responsible for the management of concessions, so that government will enjoy maximum flexibility in terms of allocating responsibility to the most appropriate Minister / Ministry when the need arises. This approach will accommodate future needs both with reference to a scenario where the Privatization Commission is still in existence and the opposite scenario where it has been phased out.

Suggested amendments are contained in Annex 1.

3. **COMPETITION**

3.1 POLICY

3.1.1 The NTP adopts the objectives to:

> "promote competition within and between modes";
>
> "create a climate in Malawi that promotes and sustains the participation of the private sector in the financing, the construction, the maintenance and the management of railway lines",

and identifies the following strategies in pursuance thereof:

> "promote private participation in railway operations and in the infrastructure under a concessionary arrangement";
>
> "let Malawi Railways have complete autonomy in setting tariffs, determining its staff levels and freedom to initiate, drop or alter the nature and the frequency of services"; and
>
> "grant concession and/or operational responsibility of railways to private entrepreneurs".

3.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to encourage:

> "improved diversity of services and provision of services on a competitive bid basis through the promotion of fair and healthy competition between services providers" (article 2.4(l));
>
> "broad-based private investment in transport infrastructure and service provision, and the restructuring of public enterprises to achieve full commercial autonomy" (article 2.4(c)); and
>
> "the economic and institutional restructuring of railways ... which shall include ...:
>
> (i) according autonomy to railways in order to enable them to achieve full commercialization ...; and
>
> (ii) increasing private involvement in railway investment... " (article 7.2.(a)(i) and (ii))".

3.2 STATUS QUO NARRATIVE

The competition environment for railways is discussed with reference to the DCA and the RA respectively. The provisions of the CFTA are also relevant here.

3.2.1 **Market entry**

(a) Draft concession agreement

The DCA contains a number of provisions dealing both with the provision of **railway services** and the management of **railway infrastructure**.

With regard to **services**, the DCA has been drafted in a manner which reflects the assumption that the **agreement** itself provides the authorisation for market entry by the concessioned railway.

With regard to **infrastructure**, the DCA stipulates that the "railway estate" which includes railway infrastructure, is provided to the concessionaire for its exclusive use during the concession period (Clause 29). The concessionaire assumes responsibility for the railway estate as an owner, but may not sell the

assets or use them as collateral. The concessionaire must return the railway estate in a condition which permits the continued management and operation of the railways for a five year period after the expiry of the concession at a level of services and costs consistent with those which applied during the concession (Clause 33). The DCA contains no requirements for approvals to be obtained from the Minister, except in the case where the concessionaire intends to invest in additions in terms of a contract which would exceed the concession period (Clause 38). The concessionaire may also request the Minister to implement expropriation procedures, where it wishes to acquire land (Clause 37).

(b) Railway Act

The RA contains a number of provisions which, read collectively, introduce limited conditions for **market entry**. This applies both to the provisions of railway **services** and railway **infrastructure**.

(i) Railway services

In the case of **railway services**, the RA focuses on conditions which a railway administration must fulfill with the **opening** of a railway.

Where a new railway is opened, the Minister is required to sanction the use of locomotives and rolling stock (Sec 15(1)). In addition, rolling stock which may not be moved until the railway has made **General Rules**, which have been approved by the Minister in terms of section 48 (Sec 15(2)).

Additional requirements apply in the case of new railway providing **passenger services**. These entail that:

- the service provider give the Minister notice of its intention to carry passengers (Sec 16) although the Minister may dispense with this requirement; and
- the Minister must be satisfied as to the safety of the railway after submission by an engineer of a written report outlining specified safety matters (Sec 17).

(ii) Railway infrastructure

A number of provisions in the RA impose requirements for the provision of **new railway infrastructure**, ie:

- any private company is required to submit a scheme to the Minister for approval of railway construction (Sec 3);
- a private company or the government is required to deposit for approval plans and sections relating to the intended construction (Sec 4); and
- a constructed railway must be made and maintained in the line and at the levels shown in the deposited plans (Sec 5).

3.2.2 **Commercial operations**

(a) Draft concession agreement

The underlying philosophy of the DCA is that the concessioned railway should operate autonomously and that the concessionaire should enjoy a high degree of commercial freedom. This is apparent from the following:

- the concessionaire may contract for any service it deems necessary (Clause 7);
- the concessionaire is free to negotiate and fix freight rates with customers (Clause 12);
- the concessionaire is free to transport passengers as a commercial activity (Clause 12);
- the concessionaire is free to define the nature, the configuration, the technical and commercial organization and the employment requirements of the railway (Clause 12);
- the concessionaire may enter into an agreement with a third party to provide other methods of transportation to deliver railway services (Clause 12); and

- the concessionaire may function as a logistics operator or agent (Clause 12).

The concessionaire is obliged to provide certain passenger services as a public service obligation, but is remunerated on the basis of a mutually-agreed fee (Part 4).

With regard to the railway estate, the concessionaire:

- may grant occupancy authorizations for any asset, give leases and collect fees and rents, subject to the right of the Minister of Finance to establish a presumptive lease value if a transaction is not at "arms-length" and approval by the Minister if the contract period will exceed the concession period(Clause 34);
- may return surplus assets not required for its use (Clause 35);
- may invest in the railway estate, subject to approval of the Minister if the contract will exceed the concession period (Clause 38);
- may contract for rehabilitation of railway infrastructure, subject to the obligation to expend amounts equivalent to the total annual depreciation charges for all infrastructure items (Clause 39);
- enjoys exclusive use of the railway infrastructure, subject to the limitation that the Minister may require the concessionaire to permit another service provider to use such infrastructure upon payment of an agreed fee after 5 years (clause 42 and 43);
- may authorize or promote the use of moveable assets belonging to third parties (Clause 45);
- may dispose of moveable assets which it has acquired (Clause 46); and
- is free to hire employees, subject to the obligation to hire those employees of the Malawi Railways it has identified and deemed necessary (Clause 49).

(b) Railway Act

The RA contains a number of provisions which govern commercial railway operations.

The RA requires the railways to formulate General Rules and submit them to the Minister for approval (Sec 48). General Rules must deal with:

- general safety and matters such as rolling stock speed;
- environmental issues such as the carriage of hazardous goods;
- in-house operations and management, eg the conduct of railway employees; and
- economic matters such as fixing railway charges for freight and passenger services and specifying goods which may be charged at special rates.

The General Rules are noteworthy in that they introduce elements of **economic regulation** which clearly conflict with the intention of the concession agreement. The most noteworthy is the requirement that the railway administration should fix charges for freight services which are then approved by the Minister. This contrasts with the freedom enjoyed by the concessionaire to negotiate freight rates.

The railway administration must keep copies at railway stations of the General Rules and any person may inspect the Rules at any reasonable time. A railway administration other than the government may be fined for failing to make General Rules. The fine is currently set at £ 2 for every day during which a failure to make General Rules continues. There is no obligation on a railway to revise its General Rules.

In terms of the railways' relationship with **customers** and other **service providers**, the RA contains provisions dealing with:

- the requirement to provide reasonable facilities for receiving, forwarding and delivering traffic (Sec 23);
- the requirement to provide reasonable facilities to receive and forward traffic from other railways (Sec 24);
- the requirement not to make or give any undue or unreasonable preference or advantage to any person or traffic or subject such person or traffic to undue or unreasonable prejudice or

disadvantage (Sec 25);

- the right to charge "reasonable terminals" (the latter being defined as charges for stations, sidings, wharves, etc) (Sec 25);
- the burden of proof resting on the railway to prove that it does not amount to undue preference to charge a trader, group of traders of traders of a local area, lower rates than another trader, group of traders or traders of another local area (Sec 27);
- the requirement to submit half-yearly returns of capital and revenue transactions and traffic (Sec 29);
- the rates payable by the railway to a local authority which are fixed by the Minister (Sec 31);
- the liability of the railway for loss or injury to goods, which is limited to loss or injury caused by negligence or misconduct (Sec 35);
- monetary limits which are set on the liability of the railway for loss, etc of certain animals (Sec 36);
- the liability of the railway for loss or damage to luggage where it was delivered into the railway's custody (Sec 37); and
- the liability of the railway for the loss of certain items is limited unless the value was declared at the time of delivery (Sec 38).

Finally, it should be noted that the requirement of General Rules (Sec 48) is also relevant to commercial operations. Eg, where General Rules are made they could provide for matters such as charges, warehousing of goods, etc.

3.3 STATUS QUO ANALYSIS

3.3.1 **Market entry**

With regard to the provision of **railway services**, the following may be concluded:

- The proposed approvals for the use of locomotives and rolling stock contained in Secs 15, 16 and 17 fall under Part II titled "Opening of the Railway." Given that the RA dates from 1907, it may be concluded that these provisions lay down the procedures which had to be followed prior to the **first opening** of the railway. Based on such an interpretation, these sections would not apply to the concessioned railway as:

  - **S** the concessionaire is not **opening** a railway, but merely taking charge of an existing infrastructure and locomotives / rolling stock; and

  - **S** the locomotives and rolling stock which the concessionaire is taking over, form part of the railway which has already been **approved** in terms of the RA.

  This would also imply that the General Rules, which the railway were required to submit prior to it moving any rolling stock, were approved upon occasion of the first approval given by the Minister for the opening of the railway. Given the period of time involved, this conclusion is probably unverifiable. It is, nevertheless, potentially important in terms of any requirement which the concessionaire may face to formulate and submit General Rules. This aspect is considered further under 3.3.2 below.

- If the opposite interpretation were to be accepted, namely that Secs 15 - 17 still apply to the concessioned railway, it could be argued further that the **granting** of the concession (once the agreement enters into force) amounts to the required approvals. The following could be advanced in favour of this argument:

  - **S** the Minister responsible for transport, who in terms of the DCA is responsible for regulating railway activities, is the same Minister who is required to provide the approvals required by the RA; and

  - **S** a reading of the DCA in its totality confirms that the intention is that the concessionaire

should be able to commence operations immediately and that no further approvals are required.

However, it should be noted that the DCA will be signed on behalf of the government by the Minister of Finance, rather than the Minister responsible for transport. For the sake of clarity, a supplementary instrument could be annexed to the DCA whereby the Minister responsible for transport confirms the granting of the required approvals.

With regard to **railway infrastructure**, it may be noted that the DCA is silent on this issue, as the concession clearly focuses on the assumption of responsibility for the existing infrastructure, rather than for the provision of new infrastructure.

The provisions of Secs 3, 4 and 5 of the RA lay down standard approval procedures for new infrastructure which do not impose a significant burden on any railway administration. These provisions would clearly apply in the case of any expansion of the existing railway infrastructure, although such a development appears unlikely. As such, they cannot be regarded as being unnecessarily restrictive of the concessionaire's commercial freedom. In addition, Secs 7 - 14 provide a useful framework for addressing eventualities which may occur with new construction or works and as such will assist the concessionaire to perform activities which necessarily flow from the obligation to undertake maintenance, etc.

3.3.2 **Commercial operations**

Based on an analysis of the applicable provisions of the RA, the following may be noted:

- Sec 48 of the RA requires a railway to make General Rules which are intended to cover various aspects of day-to-day operations. Based on the comment made above, it could be argued that General Rules were approved when the railway first became operational, and that such approval is still valid even although the administration of the railway is being transferred to the concessionaire. This argument is supported by the fact that:

  - there is no requirement for a revision of the General Rules (ie once approved such rules do not require re-approval); and

  - the RA does not require a re-approval of rules where the administration of a railway is transferred.

  The contrary argument is that the wording of the RA is peremptory, ie "a railway administration shall make General Rules" and that the requirement is imposed on a new railway as well as any subsequent railway administration, including the concessionaire. The enforcement of this requirement would, however, infringe on the concessionaire's rights under the DCA. For example, the General Rules would require the concessionaire to fix charges, whereas he enjoys the freedom under the DCA to negotiate charges individually.

  In practice, the potential conflict may be more apparent than real. It is clearly unlikely that the Minister will require formulation of General Rules, given the content of the DCA. The risk is further reduced by the fact that the Minister required to approve General Rules (ie the Minister responsible for transport) and the Minister who in terms of the DCA will be regulating railway activities is, in practice, the same person.

  Although the risks to the concession of Sec 48 may largely be discounted, it remains a theoretical stumbling block which should be removed. The approach proposed under 3.2.1, ie the inclusion of an addendum to the DCA, to confirm the non-application of Sec 48, would serve to eliminate any doubt. In the longer term, the repeal of Sec 48 is advisable.

- In addition to Sec 48, a number of other conflicts occur between the RA and DCA which may not be of immediate concern, but could present stumbling blocks once the concession is up and

running. These are:

- **S** The provisions of Secs 23 (traffic facilities) and Sec 24 (connecting traffic) are potentially restrictive for the commercial freedom of the railways. The provisions also appear to conflict with the DCA which grants the concessionaire the freedom to define the configuration and the technical and commercial organization of the railway (Clause 12).

- **S** Sec 25 (undue preference and charges) are respectively covered by the CFTA and in conflict with the DCA. The CFTA is sufficiently wide to allow for any undue preference which amounts to an anti-competitive trade practice to be dealt with in terms of that Act. The requirement for reasonable charges conflicts with the freedom of the concessionaire to negotiate rates with its customers (Clause 12). Similarly, Sec 27 (burden of proof) is inappropriate to the commercial environment envisaged for the concessioned railway and adequately dealt with in the CFTA.

- **S** Sec 29 (submission of returns) is dealt with in the DCA in the requirement that the concessionaire submit an annual report (Clause 59).

- **S** Secs 35 - 38 (Liability of railway) require revision in terms of monetary values for liability limits. A broader question is whether they are appropriate in the RA and whether it is not perhaps preferable to deal with this issue in the DCA or by way of contracts between the railway and (freight) customers.

3.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- C An addendum be annexed to the DCA, signed by the Minister responsible for transport, stating that upon signature of the DCA:

  - **S** all approvals for the use of locomotives and rolling stock and the opening of the railway for the carriage of passengers as required by Sec 15, 16 and 17 of the RA are granted;

  - **S** the Minister confirms the interpretation that the concessionaire is not required to submit General Rules in terms of Sec 48, based on the conclusion that General Rules only had to be submitted when the railway first became operational;

  - **S** in the event of any complaint directed to the Minister regarding any matter contemplated in Secs 23 - 29, the Minister will not exercise the option of referring such matter to the High Court, but will deal with it by referring the matter to the Competition and Fair Trading Commission; and

  - **S** the Minister confirms the intention to be guided in the interpretation of Sec 26 (1) of the RA, which mandates him to refer a matter to court, by the provisions of the DCA (thereby confirming that the Minister will refer such complaints to the Competition and Fair Trading Commission rather than the court).

- C The RA be amended by deleting Secs 23 - 29 and Sec 48 (and Sec 15(2) which contains a reference to the General Rules made in terms of Sec 48) .

Suggested provisions are included in annex 2.

4. **SAFETY**

4.1 POLICY

4.1.1 The NTP adopts the objectives to:

> "ensure that the Railway Act and other legal policy instruments are updated periodically and strengthened to ensure safe railway operations",

and identifies the following strategies in pursuance thereof:

> "promote railway safety and environmental protection"; and
>
> "strengthen the enforcement provisions in the Railway Act".

4.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to:

> "ensure effective environmental management with due consideration of relevant international and regional conventions" (article 2.4(o));
>
> "facilitate the provision of ... a safe and environmentally-friendly railway service ..." (article 7.1);
>
> "standardize inspection and maintenance procedures for rolling stock" (article 7.3(2)(d));
>
> "standardize accident investigation procedures" (article 7.4(1)(b)(ii)); and
>
> "promote the adoption of common safety rules and regulations governing the transportation of hazardous materials" (article 7.6).

4.2 STATUS QUO NARRATIVE

4.2.1 **Railway Act**

The RA does not have a comprehensive **safety** focus. Provisions relating to safety are scattered throughout the Act and even when viewed collectively, do not necessarily provide a comprehensive safety framework. These provisions generally relate to:

C **infrastructure and equipment-related safety**:
RA: (section):
- **S** 9: execution of powers in relation to railway construction;
- **S** 11: service provider duty to construct accommodation works on land adjacent to the railway;
- **S** 13: erection of fences, gates, screens and bars; and
- **S** 14: power of a service provider to remove obstacles dangerous to the working of the railway.

C **operation of rolling stock-related safety**:
RA: section:
- **S** 16: notification regarding the opening of passenger services;
- **S** 17: inspection and Ministerial approval of new passenger service providers;
- **S** 19: inspection of railways;
- **S** 20: Ministerial power to close railway if unsafe;
- **S** 21: inspection and approval of reopening of railway after closure;
- **S** 48(1): duty on railway service providers to develop General Rules on safety;
- **S** 65: carriage of dangerous goods; and
- **S** 68: driving of animals over a railway.

C **passenger-related safety**:

RA: section:
- **S** 56: entering and leaving of carriage while in motion;
- **S** 57: riding on a railway engine, tender or luggage van;
- **S** 58: chewing, smoking; etc in prohibited areas;
- **S** 59: intoxication of passengers or the causing of nuisance;
- **S** 66: carriage of persons suffering from leprosy and other infectious diseases;
- **S** 75: obstructing engine or carriers or endangering passenger safety; and
- **S** 77: liability of railway personnel for breaches of duty endangering passenger safety.

- **accidents**:

RA: section:
- **S** 42: report of accidents;
- **S** 43: power to make rules regarding notices;
- **S** 44: submission of return of accidents;
- **S** 45: penalties for failure to comply with sections 42 and 43;
- **S** 46: penalties for failure to comply with section 44; and
- **S** 47: provision for compulsory medical examination of person injured in railway accident.

The main focus of the safety function is on periodic inspections by an engineer appointed by the Minister and at such intervals as decided by the Minister. The engineer must inspect railways and rolling stock and submit a report to the Minister. The Minister, on the basis of the report, may order the closure of the railway for traffic or stop the use of rolling stock. Such order must set out the grounds for closure. A railway may only be reopened or rolling stock used again after it has been inspected by an engineer and the Minister has ordered its reopening.

The RA only deals with **environmental** issues in a single provision dealing with the carriage of goods of a dangerous nature (Sec 65). In this regard, the EMA provides an adequate framework for addressing environmental issues in relations to the railways. This obviates any need for further supplementation of the RA in this regard.

4.2.2 **Draft Concession Agreement**

The DCA contains only limited references to **safety** aspects. These are:

- Clause 32: The concessionaire is required to employ maintenance standards and operational methods consistent with safety standards generally accepted in the railway industry in the region (such standards would generally be developed within the context of the SADC Protocol under the aegis of the Railway Committee, which would include participation by the Southern African Railways Association (SARA)). This requirement is also made subject to the safety provisions and regulations under the RA.

- Clause 59: The concessionaire is required to submit an annual report to the Minister summarizing, amongst others, all incidents related to operational safety, including derailments, crossing protection failures, accidents and spillages.

4.3 STATUS QUO ANALYSIS

The regulatory approach adopted in the RA (and the DCA) in relation to safety essentially amounts to:

- inspections by the engineer at irregular time intervals determined by the Minister;

- closure of the railway or suspension of operation in the case of operations found to be unsafe;

- obligatory reporting of certain accidents; and

- investigation of accidents in terms of rules made by the Minister.

The approach sketched above can be described as **pro-active** in a limited sense (ie, in the case of inspections undertaken by the engineer), but more extensively **reactive** (in the sense that regulatory forces come into play, only after a safety-related event has occurred). It is, however, noteworthy that no provision is made for:

- the development of broad-based safety **standards** applicable to any Malawian railway operator (in the event that there should be more than one);
- mechanisms for measuring **compliance** by the railways with such standards (other than inspections by an engineer);
- pro-active participation by the railways in **standards development** (also as a means of encouraging voluntary compliance); and
- **sanctions** against the service provider for non-compliance.

Further potential gaps in the current legal framework relate to:

- absence of **licensing** of key railway personnel (which would include rules related to training standards, qualifications and grading);
- rules on **employment conditions** (hours of work and rest periods, control or prohibition on the use of dependence-forming substances, medical, audiometric and optometric standards, compulsory medical examinations and re-examination);

  (Note: In the case of the latter, these rules may be specified in general labour and occupational safety legislation. However, the approach adopted in other transport subsectors, eg shipping, is for such rules to be spelt out in the sub-sectoral legislation. This also ensures that the unique features of each mode, which impact on employment conditions, can be accommodated); and
- The absence of a mechanism enabling the Minister to incorporate **international standards** in the Act by way of reference or publication. The need for such a mechanism, which will obviate the need for lengthy and cumbersome parliamentary processes, is likely to become greater with the increase in regional activity in this area within international organizations of which Malawi is a member, eg SADC. A precondition should, however, also be that the Minister act only after having consulted the railways.

It may, therefore, be concluded that while the existing RA provisions do **not** conflict with the requirements of the DCA, there is a need for supplementation to provide a more extensive and appropriate safety regulatory framework to apply to the concessioned railway.

4.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

- The RA be amended to reflect a shift in regulatory focus from economic to **safety regulation**. The basic features of this approach should be:
  - **S** Imposing the requirement on the railway to develop a **safety plan** and submit it for approval to the Ministry.
  - **S** **Certification** by the railway on a six-monthly basis that it is complying with the plan.
  - **S** A requirement that a safety plan be revised in the event of any development which may have a significant safety impact, eg a serious accident.

- **S** Authorisation of the Minister to develop a safety plan for the account of the railway, where a railway fails to do so in the time allowed.

- **S** Authorisation of the Minister to prescribe any standard, rule or practice incorporated in a plan in regulations and to lay down penalties for their contravention.

It should be borne in mind that the above approach is supplemented by existing provisions in the RA in terms of which the closure of a railway can be ordered **at any time** on safety grounds (Sec 20). In practice, the Minister will have very effective powers at hand to enforce safety standards in any case of non-compliance by the railway. The inclusion of the above recommendations will, however, provide for greater **transparency** and **predictability** in regulatory actions, as an approved safety plan will provide an objective yardstick for measuring compliance or the lack thereof.

Suggested amendments to the RA and the DCA to incorporate this approach are contained in Annex 3.

5. USER PROTECTION

5.1 POLICY

5.1.1 The NTP adopts the objective to:

"To improve levels of service at affordable cost" ,

and adopts the strategy to:

"Promote the expansion of the railway network, where economically feasible, to cater for national and regional requirements".

5.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to:

> "promote customer-driven service provision through adequate access to basic transport services" (article 2.4(k)); and
>
> "facilitate the provision of a seamless, efficient, predictable, cost-effective ... railway service which is responsive to market needs and provides access to major centres of population and economic activity" (article 7.1).

5.2 STATUS QUO NARRATIVE

5.2.1 **Railway Act**

The RA contains a number of provisions relating to the treatment of railway customers, ie users. These provisions relate to both the carriage of **freight** and the conveyance of **passengers**. In a number of cases, these rules have a **safety** dimension, and have already been considered under item 4 above and have also been considered in the context of the discussion of the **commercial freedoms** enjoyed by the railways (under item 3). In this case, the focus is on the **commercial relationship** between the railway and its customers. The relevant provisions are:

- the requirement to provide reasonable facilities for receiving, forwarding and delivering traffic (Sec 23);
- the requirement not to make or give any undue or unreasonable preference or advantage to any

person or traffic or subject such person or traffic to undue or unreasonable prejudice or disadvantage (Sec 25);

- the right to charge "reasonable terminals", the latter being defined as charges for stations, sidings, wharves, etc (Sec 25);
- the burden of proof which rests on the railway to prove that it does not amount to undue preference to charge a trader, group of traders of traders of a local area, lower rates than another trader, group of traders or traders of another local area (Sec 27);
- the liability of the railway for loss or injury to goods is limited to loss or injury caused by negligence or misconduct (Sec 35);
- monetary limits which are set on the liability of the railway for loss, etc of certain animals (Sec 36);
- the liability of the railway for loss or damage to luggage where it was delivered into the railway's custody (Sec 37); and
- the liability of the railway for the loss of certain items is limited unless the value was declared at the time of delivery (Sec 38).

In addition to the above, the provisions regarding General Rules may also potentially affect the position of railway users in so far as they relate to:

- accommodation for passengers and their luggage;
- charges for goods and passengers (including special charges for specific goods); and
- terms and conditions for warehousing of goods.

5.2.2 **Draft Concession Agreement**

Provisions of the DCA which are relevant under this heading are:

- the freedom of the concessionaire to contract with customers for the carriage of freight and to agree rates (Clause 12); and
- the requirement that the concessionaire put into place reasonable measures to cover liability for damage to the railway estate, third party damage, injury to persons and any other liabilities that may arise out of the use of the estate (and provide the government with copies of supporting documentation) (Clause 13).

5.3 STATUS QUO ANALYSIS

The provisions of the RA and DCA collectively provide an adequate framework balancing the interests of the railway and its customers. However, a number of provisions have, in the discussion under 3.3.2, been shown to inhibit the commercial freedom of the railways. These include Secs 23, 25 and 27.

A further consideration to be borne in mind is the current profile of shippers of freight in Malawi which is limited to two or three large users, eg exporters of tea and tobacco. Given this profile, it appears that there is a large degree of balance in the market power wielded by the railway and its users, obviating the need for any further provisions in addition to the current framework.

A final consideration is the framework for regulating anti-competitive behaviour provided by the CFTA. The provisions of the latter appear adequate to address all possible permutations of behaviour which may be desirable to regulate between the railways and its customers. On that basis, it does not appear necessary to amplify the rules on user protection further.

5.4 RECOMMENDATIONS

The recommendations made under 3.4 with regard to Secs 23, 25 and 27 also apply in this case.

6. **REGULATORY SYSTEM**

6.1 POLICY

6.1.1 In ensuring commercially fair, safe and environmentally-friendly transport operations, the NTP adopts as a fundamental principle that:

"government shall refrain from instituting regulations which restrict the ability of any mode to compete freely with any other mode of transport"

to be entrenched through implementation of the strategy to:

"establish a Railway Regulatory Unit in the Ministry of Transport".

6.1.2 The NTP accords with the provisions of the SADC Protocol which binds Member States, *inter alia*, to:

> "develop a harmonized regional railway policy in respect of ... the expansion and strengthening of Government's capacity" to monitor compliance with policy and legislation (article 7.2(b));

but goes further than the NTP in encouraging Member States to develop:

> "… transparent, flexible, predictable and streamlined regulatory frameworks" (article 2.4(l)).

6.2 STATUS QUO NARRATIVE

The principal features of the regulatory system have become apparent in the discussion and analyses conducted above with regard to the various parts of the railway legal framework. This section serves to summarize the main features of the regulatory system. The summary distinguishes between the system as set out in the RA and DCA respectively.

6.2.1 **Railway Act**

The RA authorises 16 regulatory interventions of which:

- 9 occur prior to market entry (both in respect of the provision of railway freight and passenger **services** and in respect of railway **infrastructure**);
- 6 occur during the course of railway operations; and
- one relates to market exit.

(a) Market entry

The regulatory interventions prior to market entry impact on:

- planning and construction of railway infrastructure; and
- commencement of services.

In the **planning** phase, private service providers are subjected to 2 regulatory interventions in quick succession in the form of Ministerial approval for the scheme and plan respectively. Public service providers are subjected to only 1 regulatory intervention.

The Minister's two approvals serve different purposes. The first approval amounts to a policy decision on the desirability of the proposed new railway construction (in the case of a non-government service

provider). The second approval presumably has a technical and safety purpose, but does not fully serve the latter purpose in that there is no requirement for specific safety measures to be specified.

In the **construction** phase, the regulatory activities of the Minister fall into 4 groups:

- "controlling" the service provider's exercise of construction powers;
- issuing directives concerning accommodation works and the requisition of resources to manage gates, screens; etc;
- initiating direct enforcement where a service provider fails to construct accommodation works within a specified time; and
- adjudicating disputes between owners/occupiers of land and railway service providers on the quality of accommodation works.

In the phase prior to the commencement of **services**, freight service providers are subjected to 2 regulatory interventions, while passenger service providers are subjected to 3.

The regulatory interventions entail Ministerial approval of:

- the use of rolling stock;
- General Rules "deemed necessary" prior to the use of rolling stock; and
- the fitness of infrastructure and rolling stock (in the case of passenger services).

(b) Commercial operations

Of the 6 other regulatory interventions during this phase:

- 4 entail pro-active Ministerial action (the power to conduct safety inspections at any time, to prescribe conditions for the carriage of passengers, to reopen a railway after closure, to obtain information on accidents); while
- 2 require prior submission of complaints by service providers or users (resolution of disputes between service providers or between service providers or users).

Finally, it may be noted that the Minister has the power to enforce market exit through the power to close a railway by directing that the railway be closed for the carriage of passengers, or that the use of specific rolling stock cease or that the railway or rolling stock only be used for conveyance of passengers on such conditions as the Minister may specify.

6.2.2 **Draft concession agreement**

The DCA expressly provides that the Minister (of Transport) is responsible for regulating railway activities in Malawi (Clause 2).

Other provisions relating to regulatory powers exercised by the Minister are:

- Modifying stopping points for trains providing PSO services, subject to the renegotiation of the payment for PSO services (Clause 22);
- Approving the format of the record of PSO services held for statistical purposes (Clause 25);
- Determining the condition of railway infrastructure prior to its return upon conclusion of the concession (Clause 33);
- Authorizing occupation authorizations or leases of railway estate which exceed the concession period (Clause 34);

- Approving additions to the railway estate where the length of the contract will exceed the concession period (Clause 38);
- Authorizing new railway level or grade crossing and crossing works (Clause 40);
- Specifying new equipment and conditions for a crossing custodial service to be provided by the concessionaire (Clause 40);
- Approval of a private railway crossing where the contract length will exceed the concession period (Clause 41);
- Approval of the disposal of moveable assets by the concessionaire (Clause 46); and
- Determining whether there is gross neglect on the part of the concessionaire in maintaining the railway estate (Clause 62).

A noteworthy feature is that the Minister is generally required to provide approvals within 30 days.

The regulatory actions of the Minister are principally of a commercial nature, although a few safety-related approvals also occur.

6.3 STATUS QUO ANALYSIS

There are significant differences in regulatory focus between the RA and DCA.

In the case of the former, there is a significant focuses on **economic** regulation. Where **safety** regulation occurs, it is primarily focussed on the pre-market entry phase, although there is a potential of post-market entry safety inspections.

By contrast, the focus of the DCA is on the management issues related to the implementation of the concession. These may also extend beyond the specific cases identified in the concession as listed above.

The features of the RA regulatory system may be characterized as:

- Regulation by a **political office bearer** rather than a **technical regulator**. Although the Minister may, in practice, largely act on the advice of officials, the Minister is not obliged to do so.

- Wide **discretion** to undertake regulatory action. The RA contains few criteria guiding regulatory action, beyond those which are implicit to the individual provisions. The scope for potential abuse of authority is, in practice, increased.

- Lack of **transparency**. The Minister need not consult any outside party, nor is there an obligation to provide **reasons** for regulatory decisions.

- Lack of **information gathering powers**. The Minister has no power to oblige provision of information to inform regulatory decision-making. Decisions may, therefore, be taken on insufficient grounds.

- Absence of **time limits**. Procedures for regulatory decision-making are not specified and may in practice be protracted.

The above limitations may be countered by the general common law obligation imposed on the Minister to follow **due process** requirements and undertake **just administrative action**. Whether this is the case, can ultimately only be decided by a court of law. Parties aggrieved by Ministerial decisions are, therefore, obliged to turn to the courts for relief. Whether this provides an effective remedy against regulatory abuse within the current Malawian judicial system, falls outside the parameters of this study.

The comments made above apply with qualification to the DCA. In this regard, the following may be noted:

- The **scope** of regulatory decision-making by the Minister is more prescribed. In practice, the Minister is unlikely to interfere, in terms of the DCA, in the day-to-day operations of the railways.

- Ministerial intervention at a commercial level is principally limited to instances where the proposed activity will exceed the concession period. There is a legitimate basis for ministerial involvement.

- **Time periods** are for the most part laid down. In some cases, it appears that the 30 day limit for regulatory approvals, given the subject-matter, is too restrictive. Given the potential complexity of some of the issues involved, government may experience some difficulty in reaching decisions within the stipulated deadlines.

Both the RA and DCA provide for regulatory authority to be exercised almost exclusively by the Minister. However, in a number of cases it may be questioned whether this is appropriate given the technical nature of many regulatory decisions. In many if not most instances the Minister will act on the advice of officials. This reality probably also informs the policy decision to establish a "railway safety unit". However, this prompts the question whether legislation should not vest some regulatory responsibility in the unit. It may be noted that this development is more advanced in the case of other modes, eg in the road transport sector, the Director of Road Traffic has significant regulatory responsibility. A similar approach in the railway sector should, therefore, be considered.

6.4 RECOMMENDATIONS

IT IS RECOMMENDED THAT:

The opportunity presented by the amendment of the RA be utilized to establish a more comprehensive regulatory framework in respect of the railways, providing for:

- a statutory basis for **amicable dispute resolution** and **arbitration** procedures as provided for in the DCA in respect of contractual disputes;
- a clear definition of the focus of regulatory activity in respect of **safety** issues, providing the Minister with adequate powers to have alleged non-compliance with a safety plan investigated by a qualified person;
- **fair** and **transparent administrative procedures**, including the right of the railways to raise objections to the findings of any safety investigation;
- explicit authority to be vested in the Minister to issue a **compliance directive** - which can be enforced in the manner of a court order, if a railway fails to respond to a ministerial request to comply with a safety plan; and
- contravention of a compliance directive be made subject to an **administrative sanction** in the form of a fine.

Suggested legislative provisions are contained in Annex 4.

ANNEX 1

EXPLANATORY NOTES:

1. These provisions have been developed to supplement the gap identified in the RA with regard to a legal framework for the post-concessioning environment. In particular, the provisions aim to confirm that concessions may be employed as a form of privatization of railways and acknowledge the leading role of the institutions set up under PEPA in this regard.

2. The drafting approach which has been followed is intended to ensure that these provisions can be incorporated in the RA, with minimum amendment.

3. It is suggested that these provisions be included as a new Part III - Concessions, to follow on Part II - Opening of the Railway.

Definitions

"Public Enterprises (Privatization) Act, 1996*" means the Act and any regulations made thereunder.*

Power to conclude concession

Subject to the Public Enterprises (Privatization) Act, 1996, Act No. 7 of 1996 or any other applicable law, the provision of any railway service may be concessioned to any private sector entity.

NOTE:

1. In the event that PEPA is repealed, provision will have to be made for transitional arrangements allocating responsibility for overseeing future concessions. The PEPA regulations contain extensive provisions which could be applied to the process of concessioning, (eg pre-qualification, bidding procedures, evaluation of bids, etc) and steps should be taken to retain these even if the institutions created under PEPA are disbanded.

Trans-border concession

Subject to the Public Enterprises (Privatization) Act, 1996, Act No. 7 of 1996 or any other applicable law, an agreement may be concluded with another state or states for the purpose of facilitating the conclusion of a trans-border concession, enter into with a view to enabling -

(a) joint tendering for projects;

(b) joint processing, evaluation and awarding of tenders;

(c) joint operation of railway infrastructure and provision of railway services;

(d) exchanges of experience and knowledge in policy, technical and operational areas in railway infrastructure and the management thereof;

(e) joint railway infrastructure investment planning, negotiations, funding and management subject to the exercise of reciprocal rights of access and treatment;

(f) joint monitoring of railway infrastructure investment projects;

(g) harmonization of laws, practices, procedures to expedite joint investment planning, negotiation, funding and management; and

(h) where appropriate, extra-territorial application of regulatory mechanisms.

Concessionaire reports

(1) A concessionaire must, according to intervals determined by the Minister or at a time specified in the concession agreement, provide a concession report to the Minister.

(2) A concessionaire must report on -

(a) service quality and levels of service;

(b) financial viability of the concession;

(c) compliance with safety standards, rules and practices;

(d) steps to eliminate any anti-competitive or discriminatory practices; and

(e) any other matter in respect of which the concession or the Minister requires a report.

Obligation to provide information

(1) A concessionaire must within a reasonable time, provide the Minister with such information as is required to enable the Minister to monitor the execution of the concession.

(2) The Minister must minimize the burden imposed on a concessionaire of the requirement to collect, maintain and process information by limiting requests for information to only such information which is reasonably necessary to enable the Minister to conduct his or her monitoring functions.

Review of concessionaire's operations

(1) A concession agreement concluded in terms of this Part, must provide for the Minister to annually review the concessionaire's operations with regard to -

(a) the degree to which operational requirements, if any, have been met;

(b) compliance with safety standards,

(c) any other matter provided for in the agreement.

(2) A concession agreement concluded in terms of this Part must provide for -

(a) the circumstances under which the agreement may be cancelled on the grounds of non-performance;

(b) the procedures to apply to establish non-performance; and

(c) the compensation, if any, payable by the concessionaire in the event of non-performance being established.

ANNEX 2

SUGGESTED ADDENDUM TEXT:

ADDENDUM

CONCESSION AGREEMENT
FOR THE MANAGEMENT AND OPERATION OF
MALAWI RAILWAYS

PURSUANT to the Concession Agreement for the Management and Operation of Malawi Railways concluded between the Government of Malawi (hereinafter referred to as the "Agreement"), acting through the Minister of Finance and .... (name of concessionaire), a public limited liability company incorporated in Malawi under the Companies Act with its registered office at ... (address), the Minister of Transport, upon the signature of the Agreement, hereby:

1) certifies that approval for the use of locomotives and rolling stock as contemplated in section 15 (1) of the Railway Act and the public carriage of passengers as contemplated in section 17 of that Act is granted;

2) confirms that section 48 of the Railway Act is interpreted as not applying to the concessionaire and that the concessionaire is free to contract rates or charges as contemplated in clause 12 of the Agreement;

3) confirms that in the event that any complaint is made to the Minister in relation to a matter contemplated in Part III of the Railway Act, such complaint shall be referred to the Competition and Fair Trading Commission to be dealt with in terms of the Competition and Fair Trading Act; and

4) agrees to be guided by the provisions of the Agreement in exercising any of the powers contained in section 26(1) of the Railway Act.

MINISTER OF TRANSPORT

SUGGESTED TEXT FOR REPEAL OF SECTIONS 15 (2), 23 - 29 AND 48:

Sections 15(2), 23, 24, 25, 26, 27, 28, 29 and 48 of the Railway Act are repealed.

ANNEX 3

EXPLANATORY NOTES

1. The following proposals entail both amendments to the RA and the DCA in order to give effect to the proposed safety regulatory framework.

DRAFT CONCESSION AGREEMENT

It is proposed that the following sub-clause be included in Clause 32.

"(i) ...

(ii) The Concessionaire shall, from a date determined by the Minister in writing, submit a safety plan formulated in terms of the Railway Act to the Minister for approval ."

RAILWAY ACT

Safety plan

(1) A railway administration must, from a date determined by the Minister by written notice, prepare a safety plan, within a time specified in such notice, and submit such plan to the Minister for approval.

(2) The safety plan must contain -

(a) a description of the service being provided, including the frequency and speed of rolling stock, type and tonnage of loads and the number of passengers to be conveyed;

(b) technical specifications of equipment;

(c) such standards, rules or practices, as the Minister may reasonably require in the notice contemplated in subsection (1), relating to -

(i) rail infrastructure;

(ii) railway equipment;

(iii) construction ancillary to railway lines or railway land;

(iv) railway operations;

(v) the fitness of drivers and other key personnel;

(d) a description of operational and maintenance procedures and arrangements;

(e) particulars to demonstrate that the railway administration has established adequate arrangements for investigating accidents and other incidents, and for coordinating investigations with the Minister; and

(f) any other matter determined by the Minister.

(3) The Minister must verify the content of a safety plan and if satisfied that the plan meets the prescribed requirements, must convey approval to the railway administration in writing, which approval must not be unreasonably withheld.

(4) A railway administration must, no later than 30 June and 31 December of each year, submit a report in writing bearing a certificate from an authorised employee, confirming compliance by the railway administration with the provisions of an approved safety plan.

(5) Subsection (4) does not prevent the Minister from conducting random checks to monitor compliance with a safety plan.

(6) A railway administration must review and revise, as appropriate, a safety plan in case of -

(a) any modifications or repairs to existing equipment, which have significant safety implications;

(b) any extension of the operation or a change of its infrastructure or service character;

(c) significant changes in the railway management responsible for safety matters;

(d) changes required following any major accident;

(e) changes in safety policy, standards, aims and objectives; or

(f) changes in any applicable laws imposing safety requirements.

(7) Notwithstanding the provisions of subsection (6), a railway administration must, every three years, calculated from the date of first approval of a safety plan by the Minister as contemplated in subsection (3), report any amendments to such plan to the Minister.

(8) After a review of a safety plan in terms of subsection (6), a revised safety plan must be submitted to the Minister for approval.

Development of safety plan by Minister

(1) The Minister may develop or cause to be developed a safety plan for a railway administration where such railway administration fails to develop a plan within the time period contemplated in section ... (safety plan) or within such additional time period as the Minister may allow.

(2) The Minister may recover the cost related to the preparation of the plan contemplated in subsection (1), from a railway administration.

Standard, rule or practice has force of law

The Minister may in regulations prescribe any standard, rule or practice contained in an approved safety plan and may specify a penalty for the contravention thereof.

Incorporation of international standards in regulations

The Minister may, after consulting every railway administration, incorporate in the regulations the provisions of any international convention to which Malawi is a party containing a railway safety standard, rule or practice, or any subsequent amendment thereof, by publishing the text of such standard, rule or practice in the Gazette.

Review by High Court

Any action taken by the Minister in term of this Part is subject to review by the High Court upon

application by any interested party.

ANNEX 4

EXPLANATORY NOTE:

1. The provisions of this annex set out the regulatory procedures which may be applied by the Minister. The provisions distinguish between **disputes** which may arise out of the concession agreement and **non-compliance** with a safety plan. In the case of the former, provision is made for **amicable dispute resolution**, failing which **arbitration** proceedings are to be followed in terms of the Arbitration Act. These provisions mirror the approach adopted in the DCA. In the case of non-compliance with a safety plan, provision is made that the Minister may appoint an investigator who must submit a written finding against which the railway may also lodge objections. The Minister is obliged to consider the findings and objections and may then request the railway to comply, if there are reasonable grounds for concluding that there is non-compliance with a safety plan. If a railway fails to respond to the Minister's request, the Minister may issue a compliance directive which is enforceable in the same manner as a court order. Non-compliance with a directive is also an offence and may be punished by a fine. A railway administration may, however, challenge a compliance directive in court.

2. Provision is also made in cases where there an immediate threat to the safety of persons, for the Minister to issue a compliance directive without the need to conduct an investigation.

Regulatory principles and administrative justice

(1) The Minister must, in undertaking regulatory action in terms of this Part -

(a) promote reasonable and expeditious administrative procedures;

(b) perform his functions in an impartial manner;

(c) allow, to the maximum extent possible, market competition and the ample supply of services; and

(d) promote a safe and efficient railway transportation system.

(2) Any directive or decision by the Minister must be in writing and contain adequate explanation of the reasons therefor.

Dispute resolution

(1) In the event of any dispute arising regarding the application of a concession agreement, the Minister and a railway administration party to such dispute must seek to amicably settle the dispute.

(2) In the event that the parties to a dispute contemplated in subsection (1), fail to settle such dispute, the parties must refer the dispute to a single arbitrator, or if the parties fail to agree on the appointment of an arbitrator, each party may appoint one arbitrator.

(3) Where each party has appointed one arbitrator as contemplated in subsection (2), the two arbitrators must collectively appoint a third person as arbitrator, who must act as chairperson.

(4) An arbitration contemplated in this section must be conducted in terms of the Arbitration Act, Cap 6:03 of the Laws of Malawi.

Compliance with safety plan

(1) The Minister may, of his own accord or in response to a request or complaint regarding a failure on the part of a railway administration to comply with the provisions of an approved safety plan, appoint any qualified person to conduct an investigation to establish the facts in respect of the alleged failure.

(2) An investigator may, for the purpose of conducting an investigation in terms of this section -

(a) enter any railway work or access railway equipment and inspect such work or equipment;

(b) seize any property which may afford evidence of non-compliance with an approved safety plan; or

(c) interview any employee of a railway administration.

(3) The findings of an investigation must be recorded in writing and provided to the railway administration.

(4) A railway administration may, within 30 days after the receipt of written findings contemplated in subsection (3), lodge written objections to such findings with the Minister.

(5) The Minister must duly consider the findings of an investigator and the objections, if any, of a railway administration and may, in the event that the findings of an investigation produce facts which provide reasonable grounds for concluding that there is non-compliance with an approved safety plan, require a railway administration in writing to comply with the provisions of such plan within a period determined by the Minister.

(6) In the event that a railway administration fails to comply with a request by the Minister within the time period allowed or within such further time period as the Minister may determine upon written application by a railway administration, the Minister may issue a compliance directive against a railway administration.

(7) Despite the provisions of this section, the Minister may issue a compliance directive against a railway administration, without first appointing an investigator, if the Minister has reasonable grounds for concluding that a situation has arisen in respect of a railway which imposes an immediate threat to the personal safety of railway personnel or passengers.

Compliance directive

(1) A compliance directive may require of the person or entity at which it is directed -

(a) to cease to perform an action which is not in compliance with the provisions of this Act;

(b) to perform an action in order to comply with this Act;

(c) to amend the provisions of an approved safety plan;

(d) to develop a safety standard, rule or practice;

(e) to construct or rehabilitate any infrastructure;

(f) to provide or improve a facility;

(g) to develop management or other procedures;

(h) to do anything which, in the opinion of the Minister, is reasonably necessary in order to ensure compliance with a provision of this Act.

(2) A compliance directive must provide full particulars of the nature of the compliance action which is required and the time period within which such action must be undertaken.

(3) A compliance directive may be enforced in the manner of an order of the High Court.

(4) A compliance directive is subject to revision by the High Court upon application by the person or entity to which it is addressed.

(5) The Minister may, in the event of non-compliance with a directive administratively impose a fine not exceeding ...

(6) The imposition of a fine by the Minister is subject to review by the High Court, upon application by the person upon whom a fine has been imposed.